

THE HON'BLE SRI JUSTICE K.C. BHANU

On Tuesday, the twenty seventh day of September,

Two thousand and five.

W.P. NO.19474 of 2005

M/s Tirumala Music Centre (P) Ltd., represented

by its Chairman and Managing Director, N.Amarnath.

.....Petitioner.

And:

Bharat Sanchar Nigam Limited, represented by its General Manager, and others.

....Respondents.

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2. Before advertizing to the question as to whether the impugned action of the 1st respondent in issuing the demand notice suffers from any legal infirmity requiring any interference as such by this Court, in exercise of its writ jurisdiction, it may be necessary, briefly, to note the relevant facts leading to

the filing of this writ petition: The petitioner is a Private Limited Company, which is engaged in the business of trading in consumer electronics and home appliances, having different showrooms in Hyderabad. The petitioner pleads that during the course of its business, it has taken the dealership from the first respondent for supply of cell phone by name 'Cell One' for the purpose of marketing and distribution of its 'Cell Phone Post Paid Cellular Mobile Telephone Services', as per agreement dated 30.12.2002 and it had also furnished bank guarantee. The petitioner submits that it had received impugned demand notice on 17.5.2005 from the 1st respondent demanding for payment of payment of an amount of Rs.55,16,062-97 ps, on the ground that the subscribers who have taken Cell One post paid connection from Malakpet Dealership have defaulted in payment of the consumption charges and hence the said amount became unpaid under Clause 26.15 of the agreement. The demand of the 1st respondent is patently arbitrary and irrational. The petitioner pleaded that the dealer is a person who will give publicity and promote the Cell One services of the 1st respondent, and calling for the applications from the subscribers and thereafter the cellular cards will be provided to the customers through the dealer. It is further pleaded that the call payments were made by the customers and the same cannot be payable by the writ petitioner who is only a dealer and that it is an unilateral action taken by the respondents to determine the issue involved and called upon the petitioner to pay the amount liable by the third parties. It is further contended that the action of the respondents is not fair and reasonable. Therefore, the writ petition may be allowed.

3. Inter alia, the respondents filed counter affidavit denying the allegations made the in the writ petition and it is further contended that the matter relates to contractual one, therefore, this court cannot determine and decide the contractual issues. Further, when the writ petitioner disputes about the amount payable to the respondents, it is for him to invoke the arbitrary clause in the agreement that after giving a notice and the petitioner failed to give an explanation, and so the 1st respondent issued the impugned proceedings. If the petitioner company is aggrieved by the action of BSNL, it

can invoke the Clause 30 of the agreement for arbitration and conciliation but it cannot seek any remedy under Article 226 of the Constitution of India. Therefore, there is no violation in passing the impugned order and hence he prays to dismiss the writ petition.

4. The learned counsel for the petitioner vehemently contended that it is a duty of the dealer to give publicity calling for the applications from the customers and thereafter the cellular cards will be provided to the customers through the dealer. In this case, admittedly the call payments were made by the customers and the same cannot be payable by the writ petitioner who is only a dealer and that it is an unilateral action taken by the respondents to determine the issue involved and called upon the petitioner to pay the amount liable by the third parties. He further contended that the action of the respondents should be transparent, fair and reasonable and it is not possible to foresee as to whether the subscriber would pay the consumption bills or not. Therefore, the action of the respondents is patently arbitrary.

5. On the other hand, learned counsel appearing for the respondents contended that the matter relates to contractual one, therefore, this court cannot determine and decide the contractual issues that when the writ petitioner disputing about the amount payable to the respondents, it is for him to invoke the arbitrary clause in the agreement that after giving a notice and the petitioner failed to give an explanation, the issue has been settled and therefore, there is no violation in passing the impugned order and hence he prays to dismiss the writ petition.

6. It is not in dispute that the petitioner has taken the dealership from the first respondent for supply of cell phone by name 'Cell One' for the purpose of marketing and distribution of its 'Cell Phone Post Paid Cellular Mobile Telephone Services' (for short 'CMTS'), as per agreement dated 30.12.2002. The impugned demand notice issued on 17.5.2005 demanding payment of an amount of Rs.55,16,062-97 ps from the petitioner on the ground that the subscribers who have taken Cell One post paid connection from Malakpet

Dealership have defaulted in payment of the consumption charges and hence the dealer is liable to pay the amount under Clause 26.15 of the agreement.

7. It is not in dispute before this Court that any question, dispute or difference arising out of or in connection with this agreement or breach, termination or validity thereof, shall be first endeavoured to be settled through friendly discussions or negotiations between the parties. If the dispute cannot be amicably settled either party, as soon as practicable but not earlier than three months after a request to settle the dispute amicably has been made to the other party, give to the other party note in writing of existence of such question, dispute or difference, specifying the nature and the point at issue. And the same shall be finally settled by Arbitration conducted in Hyderabad in accordance with relevant laws and regulations in force at the time in India. All such disputes and differences which may arise between the parties hereto as to the meaning, construction effect of any of the terms and provisions of this agreement or as to the right or claim of either party under this agreement shall be referred to the sole arbitration of the chief General Manager Telecom, A.P.Circle, BSNL or his nominee including any officer of Bharat Sanchar Nigam Limited (BSNL) and as such is an interested party or that the Arbitrator so appointed has earlier dealt with the subject matter of this agreement.

8. The learned counsel for the petitioner placed strong reliance on a decision in **Harbanslal Sahnia & another Vs. Indian Oil Corporation Ltd., & others¹**, wherein it was held:

“So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (2) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. [See Whirlpool Corpn. V. Registrar of Trade Marks

(1998) 8 SCC-1)] The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

9. So from the above decision, it is clear that atleast in three contingencies the High Court can exercise its writ jurisdiction. It is not a case where the petitioner seeks enforcement of fundamental rights. The orders in question cannot be said to be without jurisdiction. But the learned counsel for the petitioner contended that there is failure of principles of natural justice on the ground that the agreement provides for appointment of sole arbitrator of the department and therefore, one of the principles of natural justice that no man should be judged for his own cause has been violated. But this court is of the opinion that that stage has not come, because the matter has not been referred to the arbitrator.

10. The learned counsel for the petitioner also placed strong reliance reported in **State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli²**, wherein it is held that:

"Interest of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions."

But in my considered opinion that the above decision has no application to the present facts of the case in view of the fact Clause-30 of the agreement is not under challenge before this court. Without, there being a challenge on the ground that a party to the agreement cannot be arbitrator in his own cause, the same cannot be determined and decided.

11. The learned counsel appearing for the petitioner placed strong reliance on the decision of the apex court in **ABL International Ltd., & another Vs. Export Credit Guarantee Corporation of India Ltd & others**³, wherein it was held:

“From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

- a. In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- b. Merely because some disputed questions of act arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- c. A writ petition involving a consequential relief of monetary claim is also maintainable.”

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12. The issue that falls for consideration before the Supreme Court was that whether the writ petition under Art.226 of the Constitution of India is enforceable in the contractual obligation of State or its instrumentality by an aggrieved party. It is also held that on a given set of facts if ‘the State’ acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution. It is further held that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably in its contractual guarantee found in Article 14 of the Constitution. Therefore, once the State or an instrumentality of the State is a party, it has an obligation in law to act fairly, justly and reasonably to a contract which is the requirement of Article 14 of the Constitution. The following passage has been relied upon by the learned counsel for the petitioner from the decision in **ABL International Ltd case** (3-supra), which reads thus:

“It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.”

13. Therefore, even from the above decision it is clear that when the parties had agreed to settle their disputes by arbitration, the courts will not permit recourse to any other remedy except by way of arbitration. In this case the parties, by virtue of the agreement dated 30.12.2002, agreed to decide the disputes finally by an arbitrary. Therefore, the remedy of the petitioner if any, if aggrieved by the demand notice is as to dispute before the arbitrator.

14. The learned counsel for the respondent also placed a strong reliance on the Division Bench Judgment of this Court in **The Government of A.P. Vs. A. Krishna Reddy**⁴, wherein it was held that:

“In our considered opinion, the concept of arbitrariness, principles of natural justice, have no application to a case and dispute arising out of a concluded contract voluntarily entered between the parties where the terms and conditions are not regulated by any statute or instruments having statutory flavour as such. That whenever a State or its instrumentality/authorities to the contract invoking the clause under the contract terminates a contract, terms of which are not regulated by any statute or rules acts under the contract and such termination normally cannot be questioned in a writ petition filed under Article 226 of the Constitution of India.”

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15. As seen from the allegations of counter affidavit whether the petitioner is liable to pay that amount or not is required to be decided basing on the evidence that may be produced before the appropriate Forum.

16. However, the learned counsel for the petitioner contended that the principles of natural justice have been violated. Before passing the impugned order, the respondents issued the proceedings dated 19.4.2005 stating that about 1165 numbers of post paid connections were activated on the basis of the subscribers applications submitted by the petitioner and they have defaulted the bills. When the Accounts Officer of the respondent's office tried to recover those outstanding dues by issuing notices to all those subscribers individually and the same were returned with the remarks of “address not

found” and on further investigation of the information furnished in the said applications it was found that the bonafides of the subscribers submitted are fake and manipulated and the BSNL suffered a loss of Rs.57,59,800/-, so the petitioner was asked to pay as per clause 26-15 of the agreement when there was no compliance, the respondents issued proceedings dated 19.4.2005 directing the petitioners to pay the revised amount, for which also, there was no reply. Therefore, the impugned proceedings dated 17/18.5.2005 was issued. The petitioner gave representation dated 1.8.2005 stating that the demand of money under Clause 26-15 is arbitrary unjust and illegal.

17. Whether the petitioner is liable to pay the amounts is required to be decided and determined in accordance with the terms and conditions of the agreement. The Clause 26-15 reads as follows:

“The Dealer shall make all endeavors to ensure that no fraud of any kind, contractual, criminal or otherwise is committed by any prospective subscribers in the matter of taking/providing CMTS connection and matters connected therewith and shall be responsible for the costs and consequences thereof.”

By invoking this Clause the demand was made. But the contention of the learned counsel for the petitioner is that the petitioner cannot unilaterally decide the amount and as per the agreement, the respondents ought to have been invoked Clause 30 of the arbitration agreement. Clause 21(1) reads thus:

“Damages: In the event of termination of this agreement consequent upon breach of any of the terms of this agreement or surrender of dealership at its own will of the dealer, damages to the extent of loss determined by BSNL, shall be recovered from the dealer in addition to the encashment of Performance Bank Guarantee”.

So, Clause 21 provides to the respondents for determination of the damages to the extent of loss caused to the BSSNL. Therefore, issuing the impugned proceedings cannot be said to be contrary to the terms of the agreement. The remedy of the petitioner is to raise dispute before the arbitration as provided in

the agreement.

18. It is also contended by the learned counsel for the petitioner that as per Guidelines for Cellular Mobile Billing, Accounting and Commercial Practices, which contained that “the address and credit worthiness of a customer shall be verified through internal resources that is commercial and field staff and all the heads of SSAs are requested to ensure that this job is done promptly and give report to CSR-2 in- charge.” Therefore, it is contended that there is no fraud played by the writ petitioner and the connections were given after verification of addresses furnished by the commercial field staff of the Department. But one of the terms of agreement says that the dealer shall make all endeavours to ensure that no fraud of any kind, contractual, criminal or otherwise is committed by any prospective subscribers in the matter. This issue of fact has to be decided and determined by the competent Forum. Hence, this Court is of the opinion that the writ petition cannot be entertained.

19. With regard to the encashment of Bank Guarantee is concerned the learned counsel for the respondents placed strong reliance on the decision in **Hindustan Construction Co.Ltd., Vs. State of Bihar and others**⁵, wherein it was held that:

“It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor.”

The instant case is not admittedly a case of fraud, but the learned counsel for the petitioner contended that it is a case an irretrievable injury would be caused to the petitioner. If the petitioner succeeds in arbitrary proceedings or in any Forum, he can get back the amount when the respondents invoke the bank guarantee. It is not disputed before this Court that the bank guarantee in this case is un-conditional one, and further more, as per the terms of the agreement, the respondents are entitled to encash the performance of the bank guarantee consequent on the breach of any terms of the agreement.

20. For the afore said reasons, the writ petition is disposed of, directing the petitioner to raise a dispute before the arbitrator as per the terms of the agreement and also by invoking Clause 30 of the agreement. No order as to costs.

Justice K.C.BHANU.

27th September 2005.

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